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STARR IS TO CLINTON AS REGULAR PROSECUTORS ARE TO BLACKS

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INTRODUCTION

Good morning. I am going to talk about race and crime and impeachment and Clinton and Starr.

I write about criminal law and race and I do a fair amount of legal commentary on the subject as well. In the last year I have written and commented for the popular press on the investigation, impeachment and trial of President Clinton.[1] I originally believed that the journalists who called me to talk about race and crime and then Clinton and Starr saw my expertise in these two areas as a happy coincidence, which was the way that I viewed it. Before I joined the academy, I worked in the Department of Justice as a prosecutor of corrupt government officials. I worked for the Public Integrity Section, which among other things makes the preliminary recommendation to the Attorney General about whether she should request appointment of an independent prosecutor to investigate allegations of crime covered by the Independent Counsel Act.

It turned out that for most journalists I was a generic criminal law professor, a telephone number in their Rolodex. Regarding Clinton-Starr, they asked questions about selective prosecution, the fair use of prosecutorial discretion and the utility of punishment. What surprised me is how often when I answered those questions I could well have been talking about African Americans and the criminal justice process. I was making many of the same points.

But there was one big difference. When I critiqued unbridled prosecutorial discretion or the system's love affair with punishment in the context of race I felt relatively alone. When I suggested that sometimes African Americans might break the law and they should not be

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[1] *See, e.g.*, David Jackson & Allen Pusey, *Starr Facing Daunting Task in Clinton Case, Experts Say Vital Evidence May Not Develop*, DALLAS MORNING NEWS, Feb. 1, 1998, at 1A; *Burden of Proof* (CNN television broadcast, Feb. 1, 1999); *Morning Edition* (National Public Radio broadcast, Feb. 5, 1998); *Rivera Live* (CNBC television broadcast, Sept. 7, 1998).

punished I was the radical oddball. When Mike Wallace did a report on my scholarship on race and crime on *60 Minutes*, he introduced his report with the words, "What you're about to see is going to infuriate a lot of you."[2] When I offered related critiques of the criminal process in the context of Clinton-Starr, however, many people according to polls, agreed with me.[3] Black, white, Asian and Latino—the majority agreed. Democratic politicians, including House and Senate members, seemed to agree as well. Now, as a scholar who serves up liberal to radical critiques of criminal justice, I got very scared when I heard myself saying things with which most people, including most whites, were agreeing. I thought I might have veered off track. I thought of the West African proverb: the poet who is not in trouble with the king is in trouble with his work.

But in preparing this presentation, I am experiencing a new emotion as a crit: optimism—cautious, guarded, rueful, angry optimism—but optimism nonetheless. I think that one valuable lesson that might emerge from the morass in which Ken Starr and Bill Clinton immersed the country is a new way for the public, and especially the white majority, to think about law breaking and punishment. I want to emphasize that although this way of thinking is new to many white middle Americans, it is not especially new to many people of color. And it obviously has not been embraced by all white people or by the public generally, and most notably not by the House Republicans who voted to impeach the president. But the public response to that vote, and to Clinton and Starr, is instructive. I will describe that response in a moment. Here, just let me say that I respect the public's response. It seems to me to be a careful, nuanced and well-reasoned reaction to the criminality of the president, the zeal of the prosecutor and the costs and benefits of prosecution. It is an extraordinary response because the public, in a wholly different context, is embracing some of the tenets of the racial critiques of the criminal justice system. So, it is a response that ultimately could have profound implications for the future of African Americans, and especially those one-third of African-

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[2] *60 Minutes: Tipping the Scales* (CBS television broadcast, Mar. 10, 1996).

[3] *See, e.g.*, Dan Balz, *Clinton Lawyers Hit Back at Starr; Some Democrats Urge Acceptance of Hill Rebuke*, WASH. POST, Sept. 13, 1998, at A1 (CNN/Gallup poll found that only one in three Americans believed Clinton should resign or be removed from office, while, according to an ABC News poll, three in five Americans said they believe Clinton broke the law); Ruth Marcus, *To Some in the Law, Starr's Tactics Show a Lack of Restraint*, WASH. POST, Feb. 13, 1998, at A1 (when CBS poll asked whether Starr was conducting an impartial inquiry or a partisan investigation, only 36% termed his inquiry "impartial" on January 26; this percentage fell to 26% by February 8).

American young men who find themselves in prison or under the supervision of criminal courts.[4]

What are the racial critiques of the criminal justice system? Here are some. The system is unjust because there are too many people of color—especially black people—in prison.[5] It is also unfair because the war on drugs has been selectively prosecuted in the black community, thereby resulting in a disproportionate number of arrests and incarcerations for crimes that blacks do not commit disproportionately.[6] American criminal justice is unjust even regarding those crimes that African Americans may commit disproportionately because it uses punishment as a response to anti-social or immoral conduct that is caused by white supremacy. Punishment, the critique suggests, is an inappropriate response to conduct bred in an environment in which law breaking looks like a rational choice.

The racial critique focuses on effects. It considers the costs of law enforcement in the black community in addition to the benefits. These effects include the fact that more young black men are in prison than college[7] and that half of prison inmates are black, even though blacks comprise only 13% of population.[8] The radical enforcement of the criminal law against blacks imposes severe costs. It significantly diminishes earning potential, disrupts families and impedes education. In addition, one in seven black men is legally disenfranchised because of a criminal record.[9]

My thesis is the following: Ken Starr is to Bill Clinton as regular prosecutors are to African Americans. I will describe why this is so by discussing three characteristics of criminal justice for African Ameri-

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[4] *See* Pierre Thomas, *1 in 3 Young Black Men in Justice System; Criminal Sentencing Policies Cited in Study*, WASH. POST, Oct. 5, 1995, at A1 (describing study); *see also Rift Between Blacks, Whites "Is Tearing at the Heart of America,"* WASH. POST, Oct. 17, 1995, at A13 (transcript of President Clinton's speech on race relations).

[5] *See* MARC MAUER & TRACY HULING, YOUNG BLACK AMERICANS AND THE CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER 1 (1995).

[6] *See id.* at 9–10.

[7] *See Black Males in College or Behind Bars in the United States, 1980 to 1994*, POSTSECONDARY EDUC. OPPORTUNITY (Postsecondary Educ. Opportunity, Oskaloosa, Iowa), Mar. 1996, at 9 [hereinafter *Black Males*]; *see also* MARC MAUER, THE SENTENCING PROJECT, YOUNG BLACK MEN AND THE CRIMINAL JUSTICE SYSTEM: A GROWING NATIONAL PROBLEM 8 (1990). In 1994, approximately 678,300 black males were incarcerated in state and federal prisons and locals jails. *See Black Males, supra.* In the same year, 549,600 black males were enrolled in post-secondary educational institutions. *See id.* In 1989, there were more young black men (from age 20 to 29) under criminal justice supervision than there were black men of all ages enrolled in higher education. *See* MAUER, *supra.*

[8] *See* MAUER & HULING, *supra* note 5, at 3.

[9] *See* Fox Butterfield, *More in U.S. Are in Prisons, Report Says*, N.Y. TIMES, Aug. 10, 1995, at A14.

cans: the state's selective prosecution, its abuse of prosecutorial discretion and its zeal for punishment. Interestingly, much of the American public has been critical of Starr on these three issues.[10] I hope to tell a story about an important moment in American history in order to advance public understanding of the racial critiques of criminal justice in the United States.

1. Selective Prosecution

Ken Starr is a special kind of prosecutor. He was appointed through the Independent Counsel Act. The Act is shortly up for renewal and it is not expected to be renewed. If it is, it may be radically changed.[11] Many people see the Independent Counsel Act as unjust. Its critics include many congresspersons of both parties. I want to introduce the critics of the Independent Counsel Act to two kinds of racial critics of American criminal justice.

First, I will consider the racial critics who focus on race-based suspicion, which is exemplified by the "driving while black" issue.[12] Then I will describe the views of those who are critical of too much law enforcement in the black community. This category includes the critics of the Chicago gang-loitering ordinance the Supreme Court is considering in *Morales*.[13] Their chorus is that there are too many black men in prison.

My co-panelist Katheryn Russell has already addressed the driving while black issue.[14] This is an issue that gets more attention than most of the racial critiques because it implicates many people who are innocent, but who nonetheless are treated suspiciously by the police. I believe, however, that the most injurious effect of race-based suspicion is its contribution to the disproportionate arrest and incarceration of guilty African Americans. The law explicitly allows law enforcement to focus on black people because they are black.[15] Race-based stops are

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[10] *See generally supra* note 3.

[11] *See, e.g., Espy Questions Counsel Statute; USDA Ex-Chief Cites $1.5 Million in Bills, "High Intangible Costs,"* WASH. POST, Mar. 14, 1999, at A6; David Johnston & Don Van Natta, Jr., *Reno and Starr Said to Agree on Framework for an Inquiry*, N.Y. TIMES, Feb. 25, 1999, at A24.

[12] *See* Katheryn K. Russell, *"Driving While Black": Corollary Phenomena and Collateral Consequences*, in this issue, at 717.

[13] *See* City of Chicago v. Morales, 118 S. Ct. 1510 (1998) (granting petition for writ of certiorari).

[14] *See* Russell, *supra* note 12.

[15] *See, e.g.*, United States v. Weaver, 966 F.2d 391, 394 n.2 (8th Cir.), *cert. denied*, 506 U.S. 1040 (1992); *see also* State v. Dean, 543 P.2d 425, 427 (Ariz. 1975) ("That a person is observed in a neighborhood not frequented by persons of his ethnic background is quite often a basis for an officer's initial suspicion. To attempt by judicial fiat to say he may not do this ignores the practical

one of the best explanations of why African Americans are disproportionately arrested and punished for drug offenses, even though they do not disproportionately use drugs.[16] There is an important correlation between looking for things and finding them. If the police decided that studying law was suspicious behavior, and, on that basis, conducted more stops of law students, the number of law students who get busted for drug offenses and other crimes would rise appreciably.

The fairness of this relationship between looking for things and finding them has been raised in the context of the Independent Counsel Act. In *Morrison v. Olson*, the Court held, with Justice Scalia as the lone dissenter, that the Independent Counsel Act is constitutional.[17] In his dissent, Scalia makes a long and remarkable policy argument against selective prosecution. He quotes with approval a speech given by Justice Robert Jackson, when he was Attorney General. Remember, if you can, that Scalia is thinking of elite government officials, not black people.

> If the prosecutor is obliged to choose his case, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case, it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him. It is in this realm—in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then

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aspects of good law enforcement."). In *Weaver*, the police officer testified that his decision to detain Weaver relied on several factors. *See* 966 F.2d at 394. His "number one" factor was that the police "have intelligence information and also past arrest history on two black—all black street gangs from Los Angeles called the Crips and the Bloods." *Id.* at 394 n.2. The court added that they "are notorious for transporting cocaine into the Kansas City area from Los Angeles for sale" and that "[m]ost of them are young, roughly dressed male blacks." *Id.* The court ruled that although officers may not constitutionally select suspects on "solely race-based suspicion," race, when coupled with other factors, may be appropriately considered. *See id.*

[16] According to government statistics, African Americans, who comprise 12% of the population, account for only 13% of drug users, yet make up 74% of those incarcerated for drug use. *See* Thomas, *supra* note 4, at A1.

[17] 487 U.S. 654, 659–60 (1988).

> looks for an offense, that the greatest danger of abuse of prosecuting power lies. It is here that law enforcement becomes personal, and the real crime becomes that of being unpopular with the predominant or governing group.[18]

So, that's the prominent racial crit Justice Scalia on why the Independent Counsel Act is unjust. And I suggest that there is broad public support for this position that prosecutorial discretion is abused when crimes are identified not because somebody has reported a particular crime, but rather simply because the attention of law enforcement is directed at that individual.

Now there is an academic response to the racial critique of the law authorizing race-based suspicion. Remember that I am concerned less with the innocent victims of those stops than with the guilty victims, that is, those people whose crimes are uncovered only because of the race-based stop. The reply given by such scholars as Dan Kahan, Randall Kennedy and Tracey Meares is that selective prosecution might not be such a bad thing when the people who are prosecuted are actually guilty.[19] If guilty blacks are apprehended it does not make sense to criticize that result from a racial perspective because the black community is improved when criminals are punished. Prosecution and punishment of people who break laws are public goods, just as a city park is a public good. Few would argue that it would be unfair for the African-American community to have a disproportionate share of parks. Law enforcement should be considered the same way. This perspective leads Tracey Meares and Dan Kahan to support the City of Chicago ordinance at issue in *Morales* that allows the police to arrest people for refusing to leave the street when the police tell them to do so.[20]

The depiction of law enforcement as an invariable public good is facially appealing, but there is a compelling reply. Too much of a good thing isn't always wonderful. Sometimes it's simply too much. In *Morrison*, Justice Scalia said that "[t]he notion that every violation of law should be prosecuted is . . . an attractive one. . . . [but t]he reality is,

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[18] *See id.* at 728 (Scalia, J., dissenting).

[19] *See* RANDALL KENNEDY, RACE, CRIME, AND THE LAW 375 (1997) ("[I]mprisonment is both a burden and a benefit—a burden for those imprisoned and a good for those whose lives are bettered by the confinement of criminals who might otherwise prey upon them."); Dan M. Kahan & Tracey L. Meares, *Foreword: The Coming Crisis of Criminal Procedure*, 86 GEO. L.J. 1153, 1162–63 (1998) (arguing that minority communities favor higher levels of law enforcement so as to remove law breakers from their communities).

[20] *See* Tracey L. Meares & Dan M. Kahan, *The Wages of Antiquated Procedural Thinking: A Critique of* Chicago v. Morales, 1998 U. CHI. LEGAL F. 197.

however, that it is not an absolutely overriding value."[21] He responds to the argument that prosecution of the guilty is necessarily and inevitably good with a Latin phrase meaning "Let justice be done, though the heavens may fall."[22] Scalia states that the thoughtful response is to understand "that the benefits of this legislation are far outweighed by its harmful effect upon . . . the nature of justice received [by potential targets of Independent Counsel investigations]."[23] So, my good friend Justice Scalia assumes criminality, i.e., that there has been a violation of law, but argues that prosecuting the criminal is not necessarily in the public interest. There are also other concerns, including the effect of law enforcement on the group of people who are victims of this selective enforcement.

The body politic's response to the Starr Investigation has echoed Scalia's critique of the Independent Counsel Act. As Scalia points out, this concept of law enforcement as a public good is an especially attractive proposition when applied to the high ranking officials covered by the Independent Counsel Act. And yet much of the public reaction to Starr's charges against Clinton has been "Yes, Clinton is guilty of violating one or more of the federal criminal laws. But investigating and prosecuting and impeaching and/or punishing Clinton is too costly a process for the nation."[24] This reaction suggests that the public is engaging in an analysis of the benefit of prosecution and punishment of a law breaker versus the cost of that law enforcement. The way to measure this cost is by gauging the effect that prosecution has on the community.

This type of cost-based analysis is exactly the analysis I suggested should guide jurors' decisions to nullify in a proposal I made for race-based jury nullification. According to my proposal, if jurors think that the cost of law enforcement in a particular case outweighs the benefit, they should nullify, i.e., acquit even if they think the defendant is guilty. Why? Because in the African-American community the heavens have been falling, in part as a result of justice being done. To state the obvious: it cannot be good for any community to have more than fifty percent of its young men under criminal supervision in one year. This has been the reality for both the District of Columbia and Baltimore, Maryland.[25] If the present rate of incarceration continues, in

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[21] 487 U.S. at 732 (Scalia, J., dissenting).

[22] *Id.* ("*Fiat justitia, ruat coelum.*").

[23] *Id.* at 733.

[24] *See generally supra* note 3.

[25] *See* NATIONAL CTR. ON INSTS. AND ALTERNATIVES, HOBBLING A GENERATION: YOUNG AFRICAN AMERICAN MALES IN WASHINGTON, D.C.'S CRIMINAL JUSTICE SYSTEM: FIVE YEARS LATER 1 (1997).

eleven years the majority of African-American men under age forty will be in prison.[26]

The public's response to Starr explicitly recognizes the political nature of the charging decision. It lays the groundwork for a construct of justice that would not require criminal prosecution as a response to every instance of law breaking.

2. Prosecutorial Tactics

Professor Angela Davis has written about the relationship between prosecutorial discretion and the disproportionate incarceration of African Americans.[27] The Supreme Court and lower courts have been reluctant to limit prosecutorial discretion for constitutional and policy reasons. Both *Armstrong* and *McCleskey* read like odes to discretion at all costs, even if, as in *McCleskey*, the risk of unregulated discretion is people being killed by the government on account of race.[28] Therefore, confronting this thorny issue has been discouraging to racial critics.

Until Ken Starr. There has been much public criticism of the tactics that Starr has used to investigate and prove the President's criminality. Commentators have accused him of bullying Monica Lewinsky into cooperating with his investigation, permitting his staff to discourage her from talking to her lawyer, forcing her mother to testify against her, threatening minor witnesses with investigation and prosecution unless they cooperate with him, using the grand jury for discovery and subpoenaing the target of his investigation to testify.[29]

There is a sense that the prosecutor went too far—that he abused his discretion in a moral, if not a legal, sense. In the *Washington Post*, Mary McGrory, writing about prosecutorial zeal of the House Republicans, said that she keeps thinking of what one witness said to Joe McCarthy during the infamous hearings of the 1950s.[30] The witness asked McCarthy, "Have you no sense of decency, sir?" Thus, even if the Independent Prosecutor's method of investigating and proving crimes is legal, it is indecent. Interesting remedies have been proposed. The

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[26] *See* Butterfield, *supra* note 9, at A14.

[27] *See* Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13 (1998).

[28] *See* McCleskey v. Kemp, 481 U.S. 279 (1987); *see also* United States v. Armstrong, 517 U.S. 456 (1996).

[29] *See* Peter Baker, *Starr Accused of Employing Intimidation*, WASH. POST, Feb. 8, 1998, at A20; Peter Baker & Amy Goldstein, *Lewinsky's Mother Overcome by Emotion During Testimony; Nurse Summoned as Lewis Spends 2nd Day at Grand Jury*, WASH. POST, Feb. 12, 1998, at A1; William Glaberson, *Tactics Called Abusive by Critics and the Ensnared*, N.Y. TIMES, Feb. 8, 1998, at 31.

[30] *See* Mary McGrory, *ISO: Reason*, WASH. POST, Jan. 7, 1999, at A3.

most likely remedy, I believe, will be that Congress will fail to re-authorize the Independent Counsel Act. Other remedies seek to control, or limit, the prosecutor's discretion, for example, by capping the amount of money he could spend on investigating a sitting president. Congressman Joseph McDade, who has been critical of Starr's tactics,[31] inserted an amendment in an omnibus spending bill that actually became law. McDade's amendment provides that "a prosecutor may not attempt to influence or color a witness's testimony."[32] There is a widespread sentiment that some limiting principle is needed for prosecutorial discretion.

My colleague Jeff Rosen, writing in the *New Yorker*, suggests that the kind of crime being investigated is, itself, a reasonable limiting principle.[33] Professor Rosen's analysis is especially interesting because three years ago he authored a well-known criticism of racial critiques of criminal justice.[34] When Rosen considers the investigation of the President for what he calls "low crimes and misdemeanors," however, he believes Prosecutor Starr has gone too far. His tactics "look uncomfortably like legalized blackmail."[35] Rosen properly blames Clinton for part of the problem because Clinton's Justice Department policies resulted in the expansion of prosecutorial power by federalizing a number of criminal offenses. Rosen wrote his critique of Starr before the recent Supreme Court case of *Knowles v. Iowa* was decided, but he foreshadowed the result.[36] In *Knowles*, the Court considered whether Iowa police could search the person and automobile of a person whom they stopped for traffic infractions. The Iowa police obviously were not searching for evidence of the traffic offense; they were looking for evidence of other crimes. Sure enough, the police found drugs on Knowles. The Court unanimously ruled that such searches violate the Fourth Amendment.[37] Rosen wrote that zealous techniques might be "perfectly reasonable when they're applied to murderers or Mafia dons," but that low crimes do not justify the same kind of zeal "because

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[31] *See* Marc Fisher, *The Undecideds; Some Meditate, Others Surf, Golf or Agonize Publicly, but Time Is Running Out*, WASH. POST, Dec. 16, 1998, at A1.

[32] *See* H.R. 4726, 105th Cong. § 821(a)(6) (1998) ("[I]t shall be punishable conduct for any Department of Justice employee to . . . attempt to influence or color a witness' testimony.").

[33] *See* Jeffrey Rosen, *Low Crimes and Misdemeanors*, NEW YORKER, Nov. 16, 1998, at 41.

[34] *See* Jeffrey Rosen, *The Bloods and the Crits: O.J. Simpson, Critical Race Theory, the Law, and the Triumph of Color in America*, NEW REPUBLIC, Dec. 9, 1996, at 27 (book review).

[35] Rosen, *supra* note 33, at 42.

[36] 119 S. Ct. 484 (1998).

[37] *See id.* at 486.

with enough time and effort, just about anyone can be nailed for a misdemeanor."[38]

Thus, even for people unsympathetic to racial critiques of criminal justice, the Starr investigation has shed light on how prosecutorial discretion can be abused—even in the prosecution of people who are guilty. A limiting principle for prosecution of African Americans is sorely needed. It is what racial critics asked for in *Armstrong* and *McCleskey* and the Racial Justice Act[39] and what we have yet to receive. Now at least we have rhetoric to sling back when we get these paeans to the beauty of unfettered prosecutorial discretion.

3. Punishment

Punishment is the third and final issue I will discuss in this comparison of the critiques of the Clinton investigation with the racial critiques. Assuming, as almost every one does, that Clinton has violated some federal law, should he be punished? If so, how?

First let's pause for a moment to consider the President's youthful criminal conduct—his possession of marijuana—and how interesting it is, in light of his support for tough drug laws, that he has never suggested that he should have been arrested, prosecuted, diverted, incarcerated or formally punished in any way for that offense.

For many more white drug offenders than black drug offenders that is the result. The Department of Justice tells us African Americans do not use drugs any more than white people, but with respect to drug-related crimes, thirty-three percent of those arrested, fifty percent of those prosecuted and over seventy percent of those incarcerated are African Americans.[40] My academic writing suggests that this is a problem and identifies two separate remedies: jury nullification and affirmative action.[41] These remedies have been controversial, in part because each would result in some guilty people going unpunished. How

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[38] Rosen, *supra* note 33, at 47.

[39] *See* Racial Justice Act, H.R. 4017, 103d Cong., 2nd Sess. (1994). The Racial Justice Act ("RJA") was first proposed in 1988. *See* H.R. 4442, 100th Cong., 2d Sess. (1988). RJA also failed in subsequent years. *See* H.R. 2851, 102d Cong., 1st Sess. (1991) (renamed "Fairness in Death Sentencing Act of 1991"); S. 1249, 102d Cong., 1st Sess. (1991); H.R. 5269, 101st Cong., 1st Sess. (1990). In both 1990 and 1994, RJA was approved by the U.S. House of Representatives. The Senate, however, has consistently defeated RJA.

[40] *See* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1993, at 592, 606 (1994).

[41] *See* Paul Butler, *Affirmative Action and the Criminal Law*, 68 U. COLO. L. REV. 841 (1997); Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677 (1995).

about that? In the case of Clinton the considered judgment of the American people is that sometimes guilty people going unpunished is just fine. Clinton should not be impeached (of course, impeachment is not technically punishment) or prosecuted for a crime after he leaves office. It would simply be too much.

Of course, many people—maybe most people—think that a formal reprimand by the Senate or a vote of censure would be an appropriate sanction. Clinton might even have to come to the floor of the Capitol and confess his sins. In other words, Clinton should be shamed. Thus, in response to Clinton's criminal conduct, a large portion of Americans embraces the radical possibility of doing nothing—not punishing Clinton at all, or alternatively, shaming him. It is very utilitarian—Immanuel Kant is undoubtedly spinning in his grave—but ultimately it is a very grown-up way of thinking about punishment. It is an analysis that I hope can be applied to black criminals as well as presidential ones.

This view of punishment is important for racial critics because of the substantial evidence that there are some crimes that African Americans commit disproportionately. They do not commit these crimes because they are African Americans; rather, the best explanation for disproportionate black criminality is environmental. The crime is bred by an environment that can be linked directly to white supremacy. For some crimes, especially violent ones, I endorse punishment exclusively for utilitarian justifications. In the case of some other crimes, however, I do not believe that punishment is the appropriate response. And, Americans are now apparently ready to accept that not every guilty person should be subject to state sanctions.

Conclusion

Finally, I want to discuss one way in which Starr's relationship to Clinton differs from that of a regular prosecutor to African Americans.

I stress, however, that the difference is not the relative harm caused. I find unpersuasive the argument that Clinton's criminality is less serious than the kinds of offenses for which black people are incarcerated, especially drug offenses. How does one compare? It is a debate about proportionality. Remember in *Harmelin*, where Justice Scalia said, "who knows?"[42] Certainly, though, there is a strong argument that the harm caused by Clinton is at least as great as that caused

[42] *See* Harmelin v. Michigan, 501 U.S. 957, 985–90 (1991) (Scalia, J., joined by Rehnquist, C.J.).

by a drug offender, especially in light of Clinton's status as the nation's chief law enforcement officer and the way that he mocked the criminal justice system by lying under oath.

Before I got religion I was a prosecutor, including serving a six-month stint as a street crime prosecutor. When you do that kind of work, one of the main things you do is a lot of allocutions in sentencing hearings about why a particular black or Hispanic person should be put in prison.[43] Although I often worked up a good prosecutor's froth, I rarely was as frothy as Judiciary Committee Chairman Henry Hyde about what Clinton's perjury had done, or could or would do, to the rule of law. He and his colleagues, even more than Starr, made a good case as to the injury that Bill Clinton caused. To me, what Clinton did is not nearly as victimless a crime as using drugs or even selling drugs to adult buyers.

The most obvious point of departure, however, between Bill Clinton and African Americans is that Clinton is a white man. In fact, he is the most powerful white man in the world. And, I am comparing him to people whom the criminal law usually constructs as niggers. The truth may be that the majority does not object to the criminal justice system treating black criminal suspects like niggers. It only takes offense at the idea of treating the President of the United States like a nigger. But that's a cynical point of view. I have intended for this presentation to be a willfully optimistic interpretation of Americans' disgust with the investigation and prosecution of the President. The public's reaction provides us racial critics with rhetoric and precedent for making our arguments. To the extent that we believe that a good argument—or public understanding of our arguments—is what has been standing in the way of improving criminal justice, our hand is strengthened. I hope that we can use the widespread public disgust with Ken Starr and the House of Representatives vs. Bill Clinton to focus attention on the equally threatening cases of the United States of America vs. African Americans.

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[43] For a description of a typical allocution in a drug case, see Paul Butler, *Brotherman: Reflections of a Reformed Prosecutor*, *in* THE DARDEN DILEMMA 1–3 (Ellis Cose ed., 1997).